

¹ It was undisputed that notice was provided to respondent on October 22, 2002, which would be more than 10 days but less than 75 days after the alleged October 1, 2002, date of accident.

failed to provide claimant a copy of its appeal brief, the claimant's attorney assumed the appeal had been abandoned and did not provide the Board with an appeal brief. Consequently, respondent requested claimant be provided reasonable time to respond to respondent's brief. The Board responded to the parties noting it was without jurisdiction to provide the relief requested by respondent. The Board further noted claimant was not without relief because there was no limit on the number of preliminary hearings that may be held in a claim.

On April 28, 2003, a second preliminary hearing was held. The parties agreed the transcript and exhibits from the first preliminary hearing held on February 10, 2003, would be considered part of the record of the second hearing. The claimant again testified and denied he had suffered an intervening skateboard accident. The new evidence presented at the preliminary hearing was the testimony of Clifford Eugene Dale, Jr., who testified claimant told him he had injured himself in a skateboard accident. This testimony was the same as his father's testimony at the first preliminary hearing. Following the hearing, the ALJ again determined claimant had suffered a work-related injury to his back and that "by the barest of margins" just cause for his failure to provide timely notice within 10 days of his accident.

In this second appeal, respondent and its insurance carrier again argue claimant failed to prove that he injured his back at work and failed to prove that he provided timely notice of the accident.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The Board's Order dated March 31, 2003, contained the following pertinent findings of fact and conclusions of law:

Claimant admits that he did not report the incident to respondent on the day that it occurred. According to claimant, he reported the accident to respondent on either October 4 or 5, 2002. But according to respondent's owner, Clifford Dale, claimant did not report hurting his back on the job until October 22, 2002. And the Judge in the preliminary hearing Order commented that Mr. Dale was exceptionally credible.

The Board concludes that the present record fails to prove that claimant was justified in failing to report the back injury to respondent within 10 days of the accident. Claimant states that he did not initially notify respondent of the accident as he was hoping that his symptoms would resolve. But according to Mr. Dale, claimant still did not report the back injury when claimant began seeking medical

treatment on October 7, 2002, or even later on October 17, 2002, when claimant's chiropractor restricted him from working.

At present, the record fails to prove that claimant provided respondent with notice of the accident or back injury within 10 days of the accident, or that claimant was justified in failing to provide notice within that time frame. Consequently, the Board must deny claimant's request for benefits.

At the second preliminary hearing, claimant again denied that he told either Mr. Dale or his son that he had injured his back skateboarding. He agreed that when he sought treatment on October 7, 2002, he did not advise respondent there was a work-related connection and that he filed for workers compensation on October 22, 2002. Conversely, Mr. Dale, Jr., recounted claimant arrived at work on October 15, 2002, limping and in obvious pain. When questioned regarding his condition, claimant told Mr. Dale, Jr., that he had fallen off his skateboard.

The ALJ specifically determined that Mr. Dale was exceptionally credible. At the first preliminary hearing he testified claimant did not provide notice of a work-related accident until October 22, 2002, and that on October 15, 2002, claimant had told him that he had hurt his back skateboarding. At the second preliminary hearing, Mr. Dale's son corroborated his father's testimony that claimant had said he injured his back skateboarding. Moreover, Mr. Dale, Jr., noted that he had observed claimant working without apparent difficulty between October 1 and October 15, and the latter date was the first time he observed claimant limping.

The medical evidence indicates that on October 7, 2002, claimant described striking his back at work and was diagnosed with muscle strain. The medical report on October 16, 2002, notes the claimant was limping with complaints of pain radiating into the left leg. This evidence is supportive of respondent's contention that an intervening skateboarding incident caused claimant's current need for treatment.

While it appears that claimant suffered a work-related injury on October 1, 2002, the credible evidence remains that claimant failed to prove he provided respondent with notice of the accident or back injury within 10 days of the accident or that claimant was justified in failing to provide notice within that time frame. It is inconsistent in this instance to argue there was just cause for the delay in providing notice because claimant hoped his symptoms would resolve but then still fail to provide notice of the accident when restricted from work. Consequently, the Board must again deny claimant's request for benefits.

AWARD

WHEREFORE, the Board reverses the Order of Administrative Law Judge Julie A.N. Sample dated May 5, 2003, and denies claimant's request for benefits.

IT IS SO ORDERED.

Dated this 31st day of July 2003.

BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant
H. Wayne Powers, Attorney for Respondent and its Insurance Carrier
Julie A.N. Sample, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director